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Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration

Frédéric Gilles Sourgens¹

Many of today's largest and most important legal disputes have changed almost unrecognizably from traditional court litigation: they are resolved by private arbitral tribunals, apparently apply multiple legal systems to achieve their final award and, at times, involve a stunning number of languages and cultures.

Unsurprisingly, international arbitrations are a teeming petri dish for the practice of comparative law. Nowhere is this practice more active than in the advocacy to international tribunals. Nevertheless, the use of comparative law in international arbitral pleading practice has received relatively little systematic attention. Authors that do tackle the use of comparative law in arbitration look more to its impact on the arbitral procedural framework, or how arbitrators themselves use comparative law, rather than to the use of comparative law in legal argument.² This leaves an important gap in the literature. This essay attempts to chart this next frontier of dispute resolution scholarship.

The bulk of the comparative work of an arbitration counsel will go towards finding effective means of persuading a tribunal.³ It is part of his

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2. See, e.g., Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 TUL. L. REV. 913 (2001) (discussing how comparative law helps to "design a procedural regime for the individual arbitration"); see generally JULIAN D. M. LEY, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003) (discussing in a comparative manner how arbitration is conducted through the key stages of an arbitration); ALBERT JAN VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958* (1981) (discussing the practice of courts in enforcing arbitral awards).

3. The term "comparative law" is not used as a means to establish the applicable law to a dispute. It assumes that an applicable law has already been chosen by the underlying contract or arbitration agreement.

advocacy tool kit.⁴ Typically, there are three distinct ways in which counsel would then deploy these tools in practice: (1) he could use comparative law to explain law foreign to the tribunal in a manner helpful to his case, (2) he could use it as a means to close legal gaps in the law applicable to the dispute, and (3) he could use it to extract general principles of international law or trade usages. This essay deals with the first of these questions. In brief, it focuses on comparative legal rhetoric in arbitration. It leaves for later discussion the more traditional substantive roles of comparative law in the context of international arbitration.

Before exploring in more detail the use of comparative law in arbitral rhetoric, two rather obvious questions must be addressed: what does “comparative law” mean, and what is “rhetoric?” Once armed with an understanding of these two definitions, this essay can delve into its analysis of comparative law as a rhetorical tool in international arbitration.

I. COMPARATIVE LAW

While the term comparative law is often used in legal discourse, its meaning is far from clear. “Comparative law” does not in and of itself identify a concrete discipline or method. It does not even attempt to provide an answer to a common problem. Rather, the term is used loosely to capture a growing number of scholars that engage in the comparison of legal systems, or their relevant disciplines to satisfy their varied intellectual curiosities.⁵ Thus, the task of discerning what comparative law is, let alone what “good” comparative law scholars ought to do, may well be impossible to achieve.

In order to understand how arbitral rhetoric interplays with comparative law, one must look to the established usages of comparative law. There are three main functions of comparative law: The first function of comparative law has always been the deeper, “academic” understanding of the law.⁶ Second, comparative law has served to improve legislative projects.⁷ As the purely “scientific” use of comparative law may well come to conclusions regarding deficits in the law—or how to mend them—both the scientific and

4. For lack of a neutral pronoun, the term “he” is used generically to encompass both men and women throughout this essay.

5. For a discussion on the dominant schools of comparative law, see Konstantinos D. Kerameus, *Comparative Law and Comparative Lawyers: Opening Remarks*, 75 TUL. L. REV. 865, 866-70 (2001).

6. See David S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 875-76 (2001).

7. See, e.g., Ole Lando, *Comparative Law and Lawmaking*, 75 TUL. L. REV. 1015 (2001).

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legislative models of comparative law have been closely allied in the past.⁸ Finally, comparative law has recently been used to address transactional concerns in the negotiation of contracts.⁹ Here, comparative law is often closely related to concerns of choice of law, or private international law as it is known in civilian jurisdictions.¹⁰

A. Comparative law as a scientific tool

Comparative law has an undeniable academic pedigree. The basic approach of scientific comparative law is rather intuitive. Simply stated it is somewhat reminiscent of Russian puppets, placing specific questions in the context of ever larger contexts. Thus, the first question of legal comparison generally concerns a specific topic—say the area of legal procedure. This question is analyzed first in terms of its basic legal principles.¹¹ Next, the comparativist looks to the application in the respective court systems.¹² The respective interplays between these legal rules in application are then examined in light of their place in the legal system in general.¹³ Finally, the legal systems themselves are put in the perspective of their own historical, political, and cultural environments.¹⁴

Scholars have put this method to a great variety of uses and refined it to meet their respective needs. Thus, some have focused on learning from foreign systems for the purpose of unifying the underlying legal systems to one another.¹⁵ These scholars tend to take a functional perspective.¹⁶

8. See Clark, *supra* note 6, at 876. To the same end, academics often encourage judges to look at comparative law from this vantage point once a particular *lacuna* or other weakness in existing jurisprudence has been discovered. See *id.*; see also SIR BASIL MARKESINIS, *COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM*, 157-82 (2003).

9. See, e.g., Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Mediation*, 75 TUL. L. REV. 913, 918-23 (2001).

10. See, e.g., H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 998-99 (2001).

11. See, e.g., Epstein, *supra* note 2, at 917.

12. See, e.g., Reinhard Zimmermann, *The UNIDROIT Principles of International Commercial Contracts 2004 in Comparative Perspective*, 21 TUL. EUR. & CIV. L.F. 1 (2006).

13. See, e.g., Walter A. Stoffel, *Enlightened Decision Making*, 75 TUL. L. REV. 1195, 1196 (2001).

14. See *id.* at 1200; see also James Gordley, *Comparative Law and Legal Education*, 75 TUL. L. REV. 1003 (2001); Arthur T. von Mehren, *The Rise of Transnational Legal Practice and the Task of Comparative Law*, 75 TUL. L. REV. 1215 (2001).

15. See Stoffel, *supra* note 13, at 1215. "Unification" is used as a term of art, meaning "the qualitative comparison of the respective norms, with view towards choosing the best one among

Others will discount a majority of such functional comparisons as meaningless, because they do not account sufficiently for the deeply rooted cultural origins of the law.¹⁷ To these scholars, comparative law merely helps gain a better understanding of our own legal “taboos;”¹⁸ it is of only limited use to improve these deeply irrational cultural responses by means of simple syllogisms.¹⁹

The traditional methods of scientific comparative law provide the methodological starting point for legal comparison. However, because of their varied scientific purposes, no one of these methods constitutes the be-all and end-all of comparative law. As will be discussed more fully below, the main attraction of these scientific methods for the advocate lie in the stores of argument in favor or against the use of comparative law to reach a normative conclusion. Thus, if an advocate wants to rely on foreign law as it is more suited to his position, he may find scientific support for his position. At the same time, his opponent will also find materials from which to assemble his defense. Neither, however, will find any help in scientific comparative law on *how* to deploy these materials as part of their case.

B. Comparative law as a legislative tool

Beyond its mere scientific use, comparative law also traditionally served as a legislative tool.²⁰ The legislative approach to comparative law, much like the scientific approach, is intuitive. It begins by analyzing a specific area of law currently under discussion for reform.²¹ Foreign legal systems

them and adapting all the others.” Konstantinos D. Kerameus, *Procedural Harmonization in Europe*, 43 AM. J. COMP. L. 401, 401 (1995); see also RUDOLF SCHLESINGER, HANS BAADE, MIRJAN DAMASKA, & PETER HERZOG, *COMPARATIVE LAW: CASES, TEXTS AND MATERIALS* 31-34 (5th ed. 1988).

16. See, e.g., Lando, *supra* note 7, at 1020 (part of these steps discussed here have already been subsumed in Professor Lando’s step of “comparative research” undertaken by the reporter); Zimmermann, *supra* note 12; see also Kazuaki Sono, *The Rise of Anational Contract Law in the Age of Globalization*, 75 TUL. L. REV. 1185 (2001).

17. See Clark, *supra* note 6, at 885-86; see also André Weiss, *Rôle, Fonction et Méthode du Droit Comparé dans le Domaine du Droit Civil*, in 1 CONGRÈS INTERNATIONAL DE DROIT COMPARÉ: PROCÈS-VERBAUX DES SÉANCES ET DOCUMENT 347-54 (1905).

18. See Clark, *supra* note 6, at 886.

19. See Adhémar Eisman, *Le Droit Comparé et l’Enseignement du Droit*, 29 BULL. DE LA SOCIÉTÉ 373, 376-79 (1900) (discussing the potential for limited approximations within legal families).

20. See generally Lando, *supra* note 7, at 871, 884, 886; Zimmermann, *supra* note 12.

21. See generally Lando, *supra* note 7; Peter Schlechtriem, *EC Directives, Common Principles, and Law Reform*, 75 TUL. L. REV. 1177 (2001); Zimmermann, *supra* note 12.

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are, then, consulted as source material for one's own drafting efforts,²² or as arguments to convince fellow lawmakers, or the public at large, of one's side in the legislative debate.²³ As a matter of legislative rhetoric, foreign laws are used as examples of how a similar position in the domestic debate has thrived or failed abroad.

The main difference between comparative law as an academic's device and as a legislative tool lies in its purpose. The academic purpose for comparative law is to gain a better understanding of the law. The legislator uses comparative law as a tool to support a political argument.²⁴ Understanding and jurisprudentially improving the law is only a secondary concern to the overarching political goal. The legislator uses comparative law as support for his conviction that the law ought to conform to some other extra legal concern.²⁵ Thus, the legislator's use of comparative law may well be close to the use an advocate before a tribunal may make of it: as a tool of persuasion. This differentiates the academic from the legislative use of comparative law.

Of course, the legislative use of comparative law is not a clear match for the arbitral advocate, either. For one, the legislator typically is concerned with convincing a domestic audience of his political goals. He does not have to communicate his argument to foreigners. Also, the use of legal argument is, in itself, a subsidiary concern for the politician. It is the main driving force in most arbitrations. Thus, while there are interesting similarities in the use of comparative law by legislators and in arbitral advocacy, these similarities may well be of limited practical value.

C. Comparative law as a transactional tool

Comparative law has also made inroads into the transactional practice and its academic analysis.²⁶ Importantly, comparative law questions look largely into the context of choice of law or dispute resolution provisions.

22. See, e.g., *PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE* (Duncan Fairgrieve ed., 2005).

23. See, e.g., R.J. Radford, *Universal Health Care Can Come With Drawbacks*, Letters to the Editor, ST. PETERSBURG TIMES ONLINE, January 7, 2003, http://www.sptimes.com/2003/01/07/Opinion/Universal_health_care.shtml (the universal health care debate in the U.S. as discussed in op-ed letters).

24. See Clark, *supra* note 6, at 911-12.

25. See *id.*

26. See Epstein, *supra* note 2, at 918-23.

These concerns are generally secondary to the broader commercial concerns in contractual negotiations. Nevertheless, as businesses become increasingly aware of their legal choice to frame their bargain, both questions are gaining prominence.

The transactional approach to comparative law, if one such approach can be identified, will look first and foremost to the commercial objectives of the client. Next, potential applicable laws and dispute resolution provisions will be assessed against this commercial objective. In some cases, transactional practitioners also encounter an additional comparative layer when parties from different legal systems have entirely different legal pre-conceptions of their relationships under a contract. When they become of aware of these differences comparative law can also act as a translation device to give comfort to all parties that the bargain to which they agree on paper is, in fact, the bargain they intended to get.²⁷

The transactional approach makes interesting advances on the relevant point of view for the arbitration practitioner. The comparative method no longer focuses on the underlying jurisdictions in their own right. Rather, it focuses on communicating and manipulating the normative content of one legal systems in terms of another. Comparative law serves the same purpose in international arbitrations, be it in a different manner.

II. RHETORIC

It is almost self-evident that the concern of an advocate, legal or political, international or domestic, involves rhetoric. Thus, an advocate in international arbitration uses comparative law as part of his or her legal rhetoric. If comparative law as an advocacy tool is to be more than an advanced exercise in smoke and mirrors, the definition of rhetoric must reflect this broader ambition for itself. This section sets out to find just such a definition. First, it will discuss the common misconceptions of rhetoric. Next, it will dispel them by reference to the foundational theories of rhetoric. Finally, it will confirm that these, sometimes ancient, theories of rhetoric still describe the best practices in current arbitral advocacy.

A. Misconceptions of Rhetoric

Rhetoric today has negative connotations.²⁸ These connotations are the worst in the legal context. Here, popular perception views legal rhetoric as

27. See *id.* at 918-19.

28. See, e.g., *Buying Votes*, Economist Intelligence Unit Briefing, Oct. 17, 2007, http://www.economist.com/daily/news/displaystory.cfm?story_id=9976401.

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little more than a cheap trick.²⁹ This point of view is consistent with the broader attitude that evidence, be it in science or law, speaks for itself.³⁰ Rhetoric steps between the evidence and the audience and shapes the evidence into something other than what it originally was.³¹ Therefore, rhetoric is an unnecessary and dangerous distraction to a proper understanding of the underlying subject.

This outlook on evidence is relatively young. In the sciences, it is traditionally rooted in the principles of positivism and, though the positivist perspective itself has largely been rejected, has been incorporated in the contemporary paradigms of scientific reasoning.³² A similar perspective has also become prevalent in the social sciences, which increasingly argued for and employed scientific methodologies to understand moral and legal questions.³³

Similar criticisms can be voiced against the use of comparative law as rhetoric in international arbitrations. As discussed below, this point of view introduces the concern that the use of comparative law as rhetoric takes the arbitrator away from making the correct decision and instead encourages him or her to make a decision on entirely improper grounds. To face this criticism an altogether different perspective on rhetoric is needed.

B. The Traditional Role of Rhetoric

In order to understand the role of rhetoric in international arbitration, the art of rhetoric must first be explored in its own right. The basic premise on

29. See, e.g., 'What a Farce,' *Simpson Trial Draws Jeers 'Round the World*, CNN, Oct. 3, 1993, <http://www.cnn.com/US/OJ/verdict/world/index.html>.

30. See M. Tullius Cicero, *Pro Milone*, XX.53, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?doc=Perseus%3Atext%3A1999.02.0011&layout=&loc=Mil.+53> (English translation by C. D. Yonge, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?doc=Perseus:text:1999.02.0020;text=Mil.:section=53>).

31. See HANS-GEORG GADAMER, *WAHRHEIT UND METHODE* 1-47 (6th ed. 1990); see also Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 684-87 (1999).

32. See generally ALEX ROSENBERG, *PHILOSOPHY OF SCIENCE, A CONTEMPORARY INTRODUCTION* (2d ed. 2005).

33. Compare GADAMER, *supra* note 31, at 12, 29, 38-9, and JOHN RAWLS, *A THEORY OF JUSTICE* (1971). That is not to say that ancient philosophy did not have powerful proponents of a similar world view—to the contrary, Plato, the most pre-eminent ancient philosopher, shared this point of view. Yet, his perspective was not shared and did not shape Western cultural traditions on point, which, *pace* Plato, remained fervently rhetorical until the dawn of modern rationalist philosophy. On this cultural development, see also QUENTIN SKINNER, *REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBS* (1996).

which rhetoric rests is rather simple: to arrive at the best solution to a relevant question, normative reasoning requires persuasion beyond the powers of strict logical argument.³⁴ This premise is plausible both in the context of great tragic choices captured by literature.³⁵ More mundanely, most everyday normative decisions are informed to a large part by our prejudgments of right and wrong.³⁶ Thus, if people are faced with several choices and each appears logical enough in their use of the evidence at stake, they will likely not agonize over which one of them most logically makes use of the evidence, but which one of them most resembles their notions of right and wrong.

Building on this premise, rhetoric traditionally insists that these underlying preconceptions of right and wrong are not altogether arbitrary.³⁷ Rather, they are based on different societal themes that each give expression to basic intuitive human experiences.³⁸ These themes, rather than pure reason, are the means by which we understand, express and act on normative truths.³⁹ Out of this basic premise, rhetoric continued to create infinitely complex systems. For the current purposes, however, this basic understanding of a more positive characterization of the task of rhetoric and its underlying premise is sufficient.

Rhetoric, thus, has internal standards of good and bad that are not simply directly proportional to the success one has at achieving the speech's intended result. It is not purely outcome oriented—thus, a successful argument can fail the internal standards of rhetoric regardless of how well it was received.⁴⁰ This internal standard of the rhetorical school against which all arguments are finally judged is whether the arguments were conducive to establishing some form of truth about social action. In fact, it is only persuasion because of such a realization that can truly be called rhetoric in

34. See Miles F. Burnyeat, *Enthymeme: Aristotle on the Rationality of Rhetoric*, in *ESSAYS ON ARISTOTLE'S RHETORIC* 88-115 (Amelie O. Rorty ed., 1996).

35. Thus, it was through oratory rather than logic that decisions of life and death were portrayed from the beginning of literature on. See, e.g., HOMER, *ILIAD*, 9.269-9.522., translated in HOMER, *THE ILIAD* 259-66 (Robert Fagles trans. 1998).

36. GADAMER, *supra* note 31, at 286-95.

37. See, e.g., CICERO, *DE INVENTIONE*, 1.1-2, translated in MARCUS TULLIUS CICERO, *DE INVENTIONE* 1-7 (Kessinger Publications 2004).

38. ARISTOTLE, *RHETORIC*, 1356a36-1359a26, translated in *THE BASIC WORKS OF ARISTOTLE* 1330-36 (Richard McKeon ed., 2001); *Id.* at 85-7.

39. See *id.*; Cicero, *supra* note 37; Burnyeat, *supra* note 34, at 88-114; Richard Brooks, *The Emergence of the Hellenic Deliberative Ideal*, 30 *HASTINGS INT'L & COMP. L. REV.* 43, 67-8 (2006); GADAMER, *supra* note 31; MARTIN HEIDEGGER, *WAS HEISST DENKEN? VORLESUNG WINTERSEMESTER 1951/52* (Reclam, 1992). Indeed, as some might argue, the very existence of existential normative truths may well depend on them. See Kronman, *supra* note 31, at 700.

40. See, e.g., CICERO, *supra* note 37, at 6-7.

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the classical sense.⁴¹ All other forms of persuasion, successful as they may be, would fail the fundamental purpose of the craft.

C. Rhetoric and International Arbitration

This lofty excursion into the world of ancient rhetoric may appear gratuitous at first. Yet, it has brought home an important lesson that legitimizes this entire enterprise: the use of rhetoric does not attempt to detract from truth, it seeks to create it.⁴² Thus, the use of comparative law as a rhetorical tool does not cheapen comparative law, nor the advocate presenting an argument. To the contrary, it opens a different point of view on both the art of arbitral advocacy and comparative law. For the comparative lawyer, it opens a new field of inquiry; for the arbitration advocate, a proper understanding of rhetoric helps to shape both his own understanding of the case and is instrumental in presenting this case to the arbitral tribunal.⁴³

In the context of international arbitration, one will find that “rhetoric” differs in important respects from the notion of an orator presenting a rousing speech to a large audience, or even the idea of a lawyer presenting his closing argument to a jury. As discussed below, the distillation of the dispute, through multiple stages of briefing before the hearing on the merits, forces the advocate to use rhetoric on a far more conceptual level than one traditionally pictures it. Thus, it is both, arguably, the furthest from the practice of rhetoric as one envisions it and the closest to its original purpose discussed above.

The arbitral process, at first blush, differs greatly from dispute to dispute. There are at least a handful of arbitration rules and institutions that, at any time, dominate the global arbitration market.⁴⁴ Beyond these global

41. On the intuitive problem of this classical position for the contemporary legal audience, see Kronman, *supra* note 31, at 680. For his resolution of this intuitive problem in favor of a rhetorical understanding, see *id.* at 700.

42. Compare Burnyeat, *supra* note 34, at 88-114, with HEIDEGGER, *supra* note 39.

43. Due to the confidential nature of arbitration pleadings, the following is based on personal experience.

44. These institutions include the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the International Center for the Settlement of Investment Disputes (ICSID), the Stockholm Chamber of Commerce (SCC), and the International Center for Dispute Resolution (ICDR). These chambers are supplemented on the global stage by ad hoc arbitrations under the non-administered UNCITRAL Arbitration Rules.

players, there is a second layer of national arbitration organizations and industry-specific dispute practices.⁴⁵ Finally, the parties have at their disposal an arsenal of options to change these default processes by means of the arbitration clause.⁴⁶ Thus, the treatment of “rhetoric in international arbitration” can only touch on the broad common questions that they will need to take into account when approaching an international dispute as advocates. Arbitration is by far too diffuse to allow for any specific answers to problems arising within each arbitral domain to be forthcoming within the confines of this essay.⁴⁷

As compared to litigation, arbitration is arguably a more precise and reasoned enterprise in several respects: The parties for the most part have a great influence on the composition of the tribunal that will hear their dispute.⁴⁸ They will likely choose experts in the relevant area crucial to the dispute. The process is, thus, already more sophisticated than a trial tried before laymen jurors and even more specialized than a bench trial due to the targeted expertise of the arbitrators in each case. Rhetoric in international arbitration, therefore, is far more cerebral from the beginning than rhetoric would be in any other forensic setting.

This nature of the process is further underlined by the fact that international arbitration has several written stages of argument before the merits of the case are ever orally discussed before the tribunal.⁴⁹ Thus, arguments are refined over longer periods of time and can be answered and refuted with the full comfort of weeks before the next round of briefing is due to the tribunal. It has also become practice in international arbitrations to provide written witness statements, as well as expert reports, far in advance of a final hearing on the merits.⁵⁰ Many tribunals further are disinclined to give credence to testimony that is unsupported by

45. Such prominent institutions include the Singapore International Arbitration Center (SIAC), the Chinese International Economic and Trade Arbitration Commission (CIAC), the Dubai International Arbitration Centre, and arbitration under the World Intellectual Property Organization Rules (WIPO).

46. See, e.g., English Arbitration Act of (1996), §1(b), available at http://www.opsi.gov.uk/acts/1996/ukpga_19960023_en_2#ptl-pbl-11gl.

47. See THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION (R. Doak Bishop ed. 2004) for an excellent survey of the different sets of practices in international arbitration organized by region.

48. See, e.g., International Chamber of Commerce, Arbitration Rules, Article 8(2), available at http://www.iccwbo.org/court/english/arbitration/rules.asp#article_8.

49. See, e.g., London Court of International Arbitration, Arbitration Rules: Rules, Clauses & Costs, Article 15 available at http://www/lcia.org/ARB_folder/arb_english_main.htm#article15.

50. See Doak Bishop, *Toward a Harmonized Approach to Advocacy in International Arbitration*, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 451, 476 (R. Doak Bishop ed., 2004).

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contemporaneous documentary evidence.⁵¹ Thus, by the time the final hearing on the merits rolls around, most of the advocacy has already been done and is firmly constricted within the confines of binders of documents and long pages of arguments and prior statements. Consequently, arbitral counsel will have little chance to dazzle his audience at the merits hearing. Worse still, even if counsel would succeed at a surprise, opposing counsel often has post-hearing briefing to diffuse the argument. In sum, Perry Mason-styled advocacy simply fails to convince in international arbitration due to a process strongly favoring balanced written advocacy.⁵²

Rhetoric nevertheless does have a place in international arbitration. As Doak Bishop, an accomplished arbitral advocate, counsels “[w]hile overt emotionalism is rarely rewarded in international arbitration, neglecting the humanity of the arbitrators is even more rarely rewarded.”⁵³ The question thus is where and how the rhetorical tradition would suggest lodging such an appeal. The most important place in the majority of arbitral disputes is in the portrayal of the facts of the dispute. As with rhetoric in general, it is important to organize these facts in light of the compelling theme of the case.⁵⁴ The theme, however, often remains more subtle than in other disputes, save in investment disputes (“the government marched onto my property at gun point and demanded the books and the keys” hardly qualifying as a subtle theme). Its appeal will largely depend on a correct understanding of the arbitrators’ experience and perspective and as this is a comparative exercise all of its own. Yet, at its core this aspect of arbitral advocacy is likely so akin to notions of traditional rhetoric that one could easily adapt Cicero’s magnificent *De Inventione* to the field.⁵⁵

It is, thus, in the presentation of legal argument that one of the main *cruces* for the arbitral advocate lies. In his legal argument, counsel has to appeal to the arbitrator’s notions of right and wrong.⁵⁶ These notions of right and wrong are far more complex and involved than the emotive

51. See *id.* at 473; see also Charles N. Brower, *Evidence Before International Tribunals, The Need for Some Standard Rules*, 24 INT’L LAW. 47, 62 (1994).

52. Perry Mason, US Legal Drama/Mystery, The Museum of Broadcast Communication, <http://www.museum.tv/archives/etv/P/htmlP/perrymason/perrymason.htm> (“As evidence mounts against his client, Mason pulls out a legal maneuver involving some courtroom ‘pyrotechnics.’ This not only proves his client innocent, but identifies the real culprit.”).

53. Bishop, *supra* note 50, at 452.

54. See CICERO, *supra* note 37, at 85-7.

55. See *id.* at 85-7.

56. See, e.g., Bishop, *supra* note 50, at 453.

response of a domestic jury. It will involve not only the cultural equitable stereotypes of the place of origin of the arbitrator, it is overlaid with normative reflexes acquired in countless years of legal training. Thus, the presenter of the legal argument to an international arbitrator not only has to worry about the question of whether or not a specific legal position appears fair to the arbitrator as a human being, but whether it can be made congruent with the natural legal “prejudgments” the arbitrator brings to the hearing table.⁵⁷ Here, the art of arbitral advocacy intersects with the science of comparative law.

III. THE USE OF LEGAL COMPARISON IN ARBITRAL ARGUMENT

The challenge facing the international arbitral advocate is remarkable. While the final goal seems rather obvious—i.e. convince the arbitrators—it requires great effort to achieve it. If we take the rhetorical school at its word, succeeding at this challenge requires the creation of a new legal world from the building blocks of the applicable law, held together by the mortar of comparative law. How should an advocate go about those tasks? As discussed below, there are three levels on which an advocate can approach this task: the first couches legal concepts of the applicable laws in a normative language open to all arbitrators; the second is more direct, explaining legal concepts by analogy to a foreign law which the arbitrators are more familiar with; finally, the third uses comparative law to deflect harmful interpretations of the applicable law. Ordinarily, arbitral advocacy will involve a little of each of these three tools. For reasons explained below, the first of these tools, the subtle explanation of the relevant concepts under the applicable law, remains far and away the most important.

A. The Legal Salad Bowl: Communicating Across Jurisdictional Divides

One of the most common aspects of international arbitration is that the parties, counsel, the arbitrators, chair, and potentially the applicable law each are at home in different jurisdictions.⁵⁸ Thus, a case involving a

57. See GADAMER, *supra* note 31, at 286-95.

58. An example of such diversity is hard to find due to the confidential nature of most arbitral proceedings. The ICSID case of *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. Arb 04/15 (2006), available at http://www.worldbank.org/icsid/cases/pdf/ARB0415_telenor-v-hungary-award.pdf, could nonetheless serve as a good example for the diversity of parties, counsel and tribunal. Telenor is a Norwegian company claiming against the Hungarian state. *Id.* The Norwegian company was represented by Hungarian counsel. *Id.* The Hungarian state was represented by the Washington office of Arnold & Porter. *Id.* The chair of the Tribunal and one

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contract dispute between an Egyptian and an Italian party easily may involve French and English counsel; the Swiss Code of Obligations as applicable law; a Tribunal comprised of a Swede; a German, and a Canadian chair; a Dubai seat and a choice among a myriad of arbitration rules. Counsel thus face the challenge to explain to a tribunal the impact of (a) the applicable law under which they likely were not trained—here the Swiss Code of Obligations, (b) the procedural law that they are not directly familiar with, here the Dubai laws applying to arbitration, and (c) the business culture that they have likely only been tangentially exposed to, here the business culture of Italy and Egypt.

The fundamental task of counsel is to transform these divergent rules, which the arbitrators thus far may have had little or no exposure to, into something that is inherently familiar to them. Analytically, this task breaks into three different components: (i) recasting rules which already seem familiar, (ii) explaining rules that are entirely foreign, and (iii) applying these legal concepts to an alien business setting.

The first element involves communication within a legal family. In our example, this exercise would apply most clearly with regard to the Swiss applicable law and the German arbitrator. It would apply, maybe with less force, to the Swedish and Canadian arbitrators (depending on which Canadian province was home to his *alma mater*). With regard to counsel, the French *avocat* would equally appear to have a leg up on his English counterpart.

While this exercise intuitively appears to be the easiest, it may well be the most difficult to master. Thus, the French *avocat* may well be tempted to rely too much on his own preconceptions of the law of obligations in their reading of the Swiss Code.⁵⁹ Further, to get to certain helpful parts of the Code, it may be necessary to disabuse the arbitrators of their legal reflexes, where a subtle difference in interpretation can win the case.⁶⁰ It is thus a task of almost having to unlearn and relearn the law for both counsel and the arbitrators. Worse still, for counsel it involves walking the tightrope between disabusing the arbitrators from some of their preconceived notions of the law while appealing to these very notions in other parts of his case. This task can only be achieved fully, if counsel consciously deconstructs the

arbitrator were British with the third arbitrator hailing from the United States. *Id.* at 3-4. The applicable law was a treaty between Norway and Hungary. *Id.* at 3.

59. See Stoffel, *supra* note 13, at 1196.

60. See *id.*

applicable law and reconstructs the law in its totality with these concerns in mind. It thus resembles a successful translation of a work of literature—carefully avoiding false friends and words evoking different connotations while relying, where possible, on linguistic similarities between the language of origin and the new host language of the work.⁶¹

One of the most frequently cited examples in which such a legal translation problem arises is in the context of *force majeure*. As an arbitration practitioner warned in the context of drafting *force majeure* clauses:

Frustration is not the equivalent of force majeure or Unmöglichkeit nor is force majeure Unmöglichkeit; even force majeure under Belgian law is not force majeure under French law. Although all these concepts belong to the same family, the distinction between them is extremely important in drafting choice of law clauses in international contracts.⁶²

After analyzing the different legal regimes in question in the article, the author concludes with the following hypothetical:

Lawyers like facts: a wine connoisseur signs a contract for the construction under his house of a very sophisticated wine cellar, air and humidity conditioned. The house is burned down before execution of the contract, leaving the basement part in perfect condition.

Under English law, this would certainly be considered frustration; in French law probably *imprévision* e.g.: to be performed, possibly after a delay because the house can be rebuilt.

The question arises whether a German judge will consider that the parties' intention in this specific contract is clear although not expressed: no wine cellar without a house. Is this completion of the contract? Or is it simply a normative problem: the very economic basis of the contract has disappeared and so the contract itself burned away with the house. What happens if the owner moves to another house of his own with a cellar? Will the judge adjust the contract and invite the building contractor to build a wine cellar in the other basement? What if the owner moves to an apartment? Depending on the answers, the flexible Japanese judge, will rule in accordance with common sense.

In fact all these cases go back to a basic error made at the moment of signing a contract. Due to changing circumstances, this error subsequently makes it very hard for one of the parties to perform the contract. The risk involved in contracting should not be such that it covers also totally unforeseeable and dramatic changes in the contractual environment. To what extent those changes have to be identified or simply mentioned in the contract, is recognized differently in every country. Knowledge of this is rather important for

61. See GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 1-51 (3d ed. 1998).

62. A. H. Puelinckx, *Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit*, *Changed Circumstances: A Comparative Study in English, French, German and Japanese Law*, 3 J. INT'L ARB. 47, 47 (1986).

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lawyers practicing international law, if they want to avoid frustration and hardship for their client and for themselves.⁶³

The arbitration practitioner is faced with the problem described in the hypothetical, the underlying *force majeure* clause is already set, in all likelihood its application to the case at hand is unclear. Mr. Puelinckx does not, however, leave the arbitration practitioner having to explain a French clause to a German arbitrator without recourse. He focuses the practitioner's attention on the common factual concern behind the different rules of law on point. A careful use of this factual matrix may be the most efficient means for the arbitration practitioner to translate the relevant question of law. It constructs the applicable legal norms (or value judgments) through their relation to archetypal fact patterns. Such a fact driven construction of the relevant legal rules is likely the best means of approaching the task of explaining normative differences in related legal systems in an arbitration. It is true to the underlying law. It keeps intact the legal intuitions of the audience. Yet, rather than allowing these intuitions to run astray, they are harnessed by counsel through a careful factual redefinition of the key legal terms in dispute.⁶⁴

The task of explaining an entirely foreign legal system to the arbitrators is based on the same principle of translation of legal concepts. It thus mirrors the work that has to be done to explain legal concepts within a legal family. It also differs in important regards. Practically, it may well be easier to have arbitrators cast aside some preconceptions that are in the way of a helpful argument in an entirely foreign context. Theoretically, however, it will be far more difficult to rebuild a legal universe from the foreign law that will appear familiar to the arbitrators, as the applicable law is not related in the same way to their own legal background.

How counsel can rebuild the legal universe will, of course, vary from case to case. The shorthand in many instances will be the use of familiar legal terms for related legal concepts. Counsel may use this familiar term and "re-define" it in his advocacy.⁶⁵ Of course, this will certainly be of little persuasive help if the difference between both legal systems on this point

63. See *id.* at 64-5.

64. On *force majeure* in French law, see FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, *DROIT CIVIL: LES OBLIGATIONS* 568-73 (9th ed. 2005). Cf. STEPHAN LORENZ, THOMAS RICHON, *LEHRBUCH ZUM NEUEN, SCHULDRECHT* 146-75 (2002).

65. The power of words in shaping our perceptions has been best described in drama. See JOHANN WOLFGANG GOETHE, *FAUST I, NACHT*, translated in JOHANN WOLFGANG GOETHE, *FAUST* 93-124 (W. Kaufmann trans., 1961); see also BRIAN FRIEL, *TRANSLATIONS: A PLAY* (1981).

supports the argument better. In such a case, it may well be useful to transliterate the original term with a definition so as to set a visual reminder of the difference.⁶⁶ Between both extremes, counsel will create a normative language that will make the applicable law accessible to the arbitrators and through the use of the language will make the arbitrators feel at ease in their new normative environs. Of course, counsel will not do well to venture down this path alone, but will recruit the help of foreign law experts, and many trained comparativists, to assist in this exercise.⁶⁷

Before moving to the final application of the legal language, one further “snag” must be noted. It is not atypical that a tribunal would have at least one member from the jurisdiction of the applicable law. In those cases, counsel must take care that the language used is not only accessible to the arbitrators that are foreign to the applicable law, but also that counsel’s use of language remains plausible within the context of the original normative discourse. Thus counsel must take care not to oversimplify or uproot legal concepts beyond reason. In a word, such an exercise is likely the most complex because it requires our original author and our foreign reader to be equally satisfied with our endeavors of legal translation.⁶⁸

As discussed above, successful legal translation in the context of arbitration is driven by a careful treatment of the facts of the case. Problematically, the facts themselves may be alien to the arbitrators, thus requiring counsel to explain a foreign law by reference to facts that themselves will be familiar to the panel. Although the lessons from comparative law for the explanation of facts in international arbitration is a matter for a different time, the application of the normative language is unavoidably a question for our current enterprise. Again, the skill lies in capturing key events in terms of the new normative language in such a manner that they make intuitive sense. Problematically, what seemed a feasible translation in theory may fall apart once these alien facts are properly excavated. The context in which a redefined term is used may then be so foreign to its original meaning that even borrowing the term would be senseless and create more confusion than it would resolve.⁶⁹ In those cases, the application of the law may well force the advocate back to the drawing

66. See Rodolfo Sacco, *One Hundred Years of Comparative Law*, 75 TUL. L. REV. 1159, 1172-73 (2001).

67. See Bishop, *supra* note 50, at 453.

68. There is very little literature indeed on this exercise in conceptual translation in the legal world. See, e.g., Sacco, *supra* note 66, at 1170-74. An interesting parallel could be drawn here to the disciplines of linguistics and comparative literature. See generally STEINER, *supra* note 61.

69. The use of “common law” to refer to “customary law” may be one such radical example. The use may at times be justified but would likely be entirely out of place if used to explain law developed through customary practice by bodies other than the courts to a U.S. arbitrator.

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board entirely. Yet, at times, it may be possible to work in epicycles to explain the legal differences, especially in the context of wholly foreign legal systems.⁷⁰ Whether this will be successful depends largely on the individual circumstances of each case.

Mr. Puelinckx's *force majeure* example quoted in full above is again instructive. Explaining the German law of *Wegfall der Geschäftsgrundlage*⁷¹ to an English arbitral panel may be beneficial by re-defining the more commonly used terms "hardship" or "frustration." If the underlying facts leading to the event allegedly constituting *Wegfall der Geschäftsgrundlage* are foreign the translation of the term to "frustration" or "hardship" may become overly strained to be convincing.

This may occur if there is a temporary regulatory failure in the formation of a business enterprise through which the performance of the contract was contemplated due to a change in law, or due to a change in the capitalization requirements of the company. Depending on the underlying obligation imposed by the contract, it may still be possible for the contract to be performed, but performance may have a legally significant different risk profile for one of the parties than what was originally anticipated. Depending on how such facts play out in a dispute, there may be a situation in which a theory of *Wegfall der Geschäftsgrundlage* would be arguable or even plausible and a frustration theory would be counterintuitive.⁷² If that were the case, the exercise of unpacking the operative facts of the case could make it impossible for an arbitral advocate to present such a plausible legal theory to an English panel; in such a scenario, the operative factual

70. The use of "discovery" to refer to civil law document disclosures may be one such use. While a U.S. arbitrator would have a very different expectation from a "discovery process" than what actually took place, it may be possible to explain these differences away without losing the value of a familiar marker to the arbitrator.

71. Mr. Puelinckx briefly discusses this concept in his article:

According to this latter doctrine, any contract has a basic aim and emanates from a basic intention of the parties which cannot be achieved or realized in the absence of an existing environment, for example, the prevailing economic and social order, the value of the currency, normal political conditions etc. This definition of the *Geschäftsgrundlage* sounds very much like the *rebus sic stantibus* doctrine in international public law treaties. German legal scholars agree that commenting on this doctrine is like skating over one night's ice.

Puelinckx, *supra* note 62, at 59.

72. German law under such circumstances recognizes a theory of *Wegfall der Geschäftsgrundlage* on a highly factual test. Generally, an increase of costs by sixty percent is sufficient to trigger it. Further, a mistake by both parties concerning a tacitly assumed legal framework has also been found to satisfy it. See generally LORENZ ET AL., *supra* note 64, at 204-06.

assumptions of English law frustration would diverge too much from the German applicable law for such a legal translation to make sense. The facts of the case may require a stretch of the factual assumptions of the law beyond plausibility. In such cases, different tools of legal translation may well be called for. One candidate to communicate the law correctly may be scientific comparative law that breaks down and explains in detail why the core factual assumptions of the laws concerned differ, so as to fully educate the panel on the relevant legal differences.⁷³

As becomes clear from this introduction to the art of using legal comparison to create a common normative language for the dispute, it is an inherently case-driven exercise. The advocate's rhetorical acumen will be tested differently each time. However, as a methodological constant, comparative law is a valuable translation tool, working in the background of the pleadings and arguments made to the tribunal. It becomes one of the main drivers behind the choice of possible themes. It is also the determinant of diction in the key passages of legal argument. In sum, "comparative lawyering" is the *conditio sine qua non* of "good lawyering" in most international arbitrations.

B. Explaining Foreign Law Concepts through Legal Analogies

Not all applications of comparative law in arbitral advocacy are as exhaustive and all-encompassing as the task of conceptual translation. One such typical use is a direct analogy of foreign law to the applicable law.⁷⁴ Direct analogies are used less frequently but are certainly common in practice.⁷⁵ Those analogies can be dangerous as they would be potentially subject to scrutiny by opposing counsel's expert. Thus, they should generally only be used if they are close to watertight. If employed sparsely, analogies are a powerful tool to create further comfort for the arbitrators. Analogies can be valuable if the law chosen by the parties has not been previously applied to a similar situation or if the law on point is still relatively unsophisticated.

If analogies are used as a further tool to create a normative language with which the arbitrators are comfortable, their use in a specific case may

73. As many arbitrators have extensive experience in foreign laws and comparative law techniques, this may be as simple as a reminder of the elements of the underlying legal theory and a caveat that the particular theory is indigenous to the applicable law.

74. See GADAMER, *supra* note 31, at 76-87.

75. See, e.g., *Final Award in case no. 5759 of 1989*, in COLLECTION OF ICC ARBITRAL AWARDS 1991-1995 175, 181 (Jean-Jacques Arnaldez, Yves Derains, Dominique Hascher eds., 1997); *Final Award in case no. 5548 of 1988*, in COLLECTION OF ICC ARBITRAL AWARDS 1991-1995, *supra*, at 32 (1997).

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also help to place an entire area of law in an appearance of familiarity. As a caveat, one must again note that as powerful a tool as it can be when important similarities exist, the worse it can backfire is if there are apparent inconsistencies. An analogy should, therefore, only be used in this context when a wider comparison is at least defensible and is compatible with the normative language at large.

The use of analogies is, thus, a target-specific tool. It can be employed by itself or in the context of a broader conceptual strategy. In both cases, the use of the analogy is meant to bridge a gap of understanding between the arbitrators and an aspect of the case. As with most aspects of advocacy however, the gap may also widen further if the analogy is ill-formed. This is a key reason for the sparse use of analogies in many arbitrations.

C. Deflecting Harmful Interpretations through Legal Comparisons

The uses of comparative law in arbitration discussed above have in common that they positively build a case for the arbitrators. Using those tools aims at convincing the arbitrators that one is right. As a flipside to these techniques, comparative law can also be used defensively as a block to harmful arguments presented by opposing counsel. This use of comparative law has two main components: (i) countering comparative law arguments made by opposing counsel and (ii) discrediting interpretations of the applicable law that do not openly draw on legal comparison suggested by opposing counsel.

As cautioned earlier, arbitration is a highly sophisticated adversarial proceeding. Any use of comparative law, whichever form it may take, is, thus, subject to rebuttal. This rebuttal will focus on the differences between the proposed interpretation and the “true” meaning of the applicable law. There are different degrees of “legal segregation” available to refute the comparative law point made by opposing counsel. Thus, at the extreme one could rely on the techniques used by comparative law scholars that see each legal system as a specific answer to problems immanent only within the legal culture of the applicable law. At the other extreme one could simply attack a point as an ill-founded comparison in this specific instance leaving the door open for other, better-formed comparisons.

Advocates also use comparative law to discredit other interpretations of law suggested by opposing counsel. For example, one could use comparative law tools as a cautionary excursus: a foreign jurisdiction interpreted a similar law in the way that opposing counsel suggests; this interpretation led to severe legal problems down the road. It is also a helpful

tool to discredit attempts by opposing counsel to create an overly optimistic normative language for a case. For example, one can use it as an illustration that the legal argument presented by opposing counsel is too much indebted to authorities that do not form part of the applicable law at all.

Both of these “defensive” uses of comparative law are an important reality check against the abuses of comparative law in arbitration that can doubtlessly arise in rare instances. When the value of rhetoric as a means to discovering normative truths was first discussed, it was juxtaposed to the view that rhetoric was little more than an arsenal of cheap tricks to confuse an audience. Our discussion of the uses of comparative law in arbitral advocacy may have come close to evoking this same criticism again. After all, what is to stop arbitral counsel from creating a normative language that is so divorced from the realities of the applicable law chosen by the parties as to make their choice meaningless?

The practical answer to this question lies in the defensive uses of comparative law and in the experience and intellect of international arbitrators. Opposing counsel will likely test both the arguments as well as the arguments’ underlying tenor with great care and present cogent and convincing counter arguments. Further, international arbitrators often are accomplished comparative jurists themselves and should in many instances be aware of foul play without the help of counsel.

These practical limitations, therefore, impose the ideal of rhetoric as an hermeneutical tool on the international arbitral advocacy on their own accord. Counsel, as a general rule, will only employ comparative law successfully if their arguments generate a valid understanding of the rules of law in play. In doing so, counsel enrich the legal culture of the host law with the many realizations and experiences of all the other normative systems drawn upon to create a convincing discourse. While these enrichments are not permanent-arbitral awards are mostly meant for the parties and not for wider consumption-they help further develop the facilities of legal professionals and academics alike to enter into discussions with one another about their respective *conditions juridiques*. This broader benefit in and of itself should dispel the notion that the use of comparative law in arbitral advocacy should be considered with suspicion, as an attempt at a self-serving muddying of the applicable legal rules.

IV. PRACTICAL LESSONS FOR TRADITIONAL COMPARATIVE LAW: COMPARISON AS RHETORIC

This analysis of comparative law in international arbitration has taken this essay full circle. It began with an analysis of comparative law in its own right. It concluded, in the last section, that one of the inherent purposes of

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comparative law, that it had previously identified, was well served by international advocacy. This purpose was the facilitation of communication between legal cultures and their occasional cross-pollination.⁷⁶ Thus, we have finally arrived at the final question of our enquiry: can the practice of comparative law in international arbitral advocacy further the study of comparative law? Or, differently put, can arbitral rhetoric cash in on Professor Glenn's promise of the "next advance" in comparative law?

The answer to this question appears to be a resounding yes. First and foremost, the practice of comparative law has served, in a scientific sense, as a means of validation of many of the methods suggested by comparative lawyers.⁷⁷ The scientific mantra has been and remains that any hypothesis must be capable of empirical refutation.⁷⁸ By using comparative law in arbitral advocacy, many of the hypotheses of comparative law about the breadth of similarities between legal systems and areas of law have of necessity been tested and continue to be tested every day. While it is only a tentative conclusion, international arbitration confirms that legal systems do share points of contact, many even share common questions and common approaches to solutions, while also confirming that legal systems are not in or moving towards a Hegelian end state of harmonization by any stretch of the imagination. The approach of international legal rhetoric has, thus, confirmed that a moderate position between the extremes of the comparative law camps has empirical merit.⁷⁹

Arbitral rhetoric can, however, do much more for comparative law than act as a test case. Importantly, the model of comparison from rhetoric can serve as a launching pad for further research into comparative law. While many of these aspects are yet in their raw state, needing further scientific exploration, there are two aspects from the practice of comparative law in international arbitration that stand out as significant. The first of these advances lies in the manner in which comparative law can be used to shape a normative discourse through shaping the very language in which it is understood. Second, as a consequence, arbitration advocacy has already

76. See *supra* note 58 and accompanying text.

77. It is indeed ironic that the rhetorical school could, thus, serve the ancillary purpose of scientific verification in this context. As was discussed previously, it was exactly the criticism leveled against rhetoric by the scientific schools that it is not subject to scientific verification.

78. See generally KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (2002).

79. See, e.g., Jan Paulsson, *La lex Mercatoria dans L'arbitrage C.C.I.*, *REVUE DE L'ARBITRAGE* 55-100 (1990) (discussing the growth of the *lex mercatoria* through comparative law methods in ICC arbitrations).

served to broaden the realm of acceptable legal comparisons. It has, thus, opened a debate that may help drive one of the most important questions of comparative law for the next century: where does comparison cease to remain meaningful?

As this essay has shown, the rhetorical school was founded around the principle that the understanding of normative truths cannot be achieved by use of pure reason alone. It required a connection to our own independent understanding of right and wrong to become meaningful. This core function of rhetoric has come to full use in arbitral advocacy and its employment of comparative law. Arbitral rhetoric at its best attempts to create a conceptual normative language in which the dispute is couched. This language seeks to explore legal realities in a foreign legal system in a way that it can be understood by an outsider. It seeks to expand the normative pre-conceptions of the audience to encompass the new legal system. In doing so, it alters the arbitrators' deep prejudgments on proper legal discourse, as well as those of counsel. Thus comparative law as rhetoric is a creative exercise that may best be described as creative normative translation.

Translation of course was one of the early starting points of comparative law itself.⁸⁰ Therefore, the translation of key foreign codes was one of the key functions of comparative law societies in the late 1800s and early 1900s.⁸¹ Arguably, it is out of this translation exercise that the drive towards harmonization first developed. The rhetorical enterprise is taking this translation a step further than even the harmonization of law. It not only translates the law passively in its own context, it actively reshapes the law within the context of the tribunal and the parties to the case. The difference is marked: rather than harmonizing the underlying laws, counsel harmonizes the "proto-legal" prejudices on which legal judgment itself is based. In philosophical terms, rather than comparing individualized objects, rhetoric subtly changes how the individualization itself occurs.⁸²

Such an active use of comparative law may well be considered a heresy by some comparative law scholars. After all, the object of the exercise is not to uncover some truth inherent in the foreign legal system, but literally to create a normative truth of one's own that draws on the normative building blocks of such a legal system. Such scholars could say it is not a faithful translation, but a purposive adaptation of the law.

This criticism overlooks the value of a creative discourse as opposed to a passive one. Rhetoric as a creative, active tool helps to shape legal

80. See Clark, *supra* note 6, at 879.

81. See *id.*

82. See generally PETER F. STRAWSON, *INDIVIDUALS* (1959); GILLES DELEUZE, *DIFFERENCE AND REPETITION* (1968).

discourse in a new light.⁸³ The question is no longer “did my theoretical enquiry into this foreign law result in some academically valuable insight?” The question becomes “how can I put the foreign law to action?” It is through the action that insights into the law, almost as a side product, come clearly into focus. In terms of literary translation, we become aware of a different truth about a work because we are forced to rewrite this work for a different audience. In terms of the overarching goals of the comparative enterprise to facilitate communication between legal systems, it brings comparative law back from the depths of a dead language to a live and fruitful discourse.

Of course, this aspect of comparative law as well as the use of foreign law as an analogy drive the question of how far we can meaningfully take legal comparison. Counsel may well, at times, pronounce as universally true what truly is legal gibberish upon closer inspection. Where is the line drawn? The answer to this question lies in the question itself. It is a tautology that comparative law can be meaningfully stretched, so long as it can harbor normative meaning. What this tautology entails is that the limits of comparative law will be tested through its use in arbitral rhetoric. Through the crucible of empirical testing, international arbitration, hand-in-hand with other aspects of the legal profession, will help shape the contours of comparative law. It will certainly push the outer boundaries of comparative law further than many scholars’ comfort zones.

It will not do so by comparing the unique; rather, it will take comparative law in a different direction altogether by choosing an active, creative point of view. As discussed, this active point of view differs from most other perspectives on comparative law due to its heavy debt to rhetoric and its unique audience of international lawyers who expect a presentation that will reduce a complex web of applicable laws to a simple, intuitive question of right and wrong. As such, the practice of advocacy in international arbitration will be one of the agents of progress hailed by Professor Glenn—though progress may at times look different from what we all had imagined it to be.⁸⁴

83. See HEIDEGGER, *supra* note 39.

84. See Glenn, *supra* note 10, at 1002.

